United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

827

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,866

UNITED STATES OF AMERICA,

Appellee

v.

EDWARD A. HINTON,

Appellant

APPEAL FROM CONVICTION AND SENTENCE OF
THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

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July 27, 1970

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TABLE OF AUTHORITIES

* Cases and other authorities chiefly relied upon are marked by an asterisk.

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QUESTION PRESENTED

Whether Appellant's being called as a witness by co-defendant, and the lower Court's instructions were so prejudicial as to constitute a denial of due process.

This case has not previously been before this Court.

REFERENCES TO RULINGS

None

STATEMENT OF THE CASE

In an indictment filed on June 17, 1968, Appellant was charged in four counts with participating in the robbery of the Eastern Savings and Loan Association at 336 Pennsylvania Avenue, S. E. Also named in the indictment was a co-defendant, Edmund S. Robinson.

The trial was held before a jury, the Honorable John H. Pratt, United States District Judge, presiding, on March 5, 6, 7, 10, 11, 12, 13, 17, 18, 19, 20, 21, 24, 25, and 26, 1969. Over 1900 pages of transcript were recorded.

Briefly, the government contended that on the morning of March 21, 1968, Appellant borrowed an automobile from one Robert Spriggs and picked up a passenger, identified as Defendant Robinson. The two drove around in Washington, D. C. for a time, finally parking the automobile in the vicinity of The Eastern Savings and Loan Association shortly after 3:00 P.M. The government further contended that while Appellant waited with the automobile, Defendant Robinson entered The Eastern Savings and Loan Association, and took approximately $3,000 from a bank teller at gun point. He left the Savings and Loan Association and returned to the automobile and Appellant.

Further, it was contended that Appellant and Defendant Robinson drove the automobile to an alley behind 319 - 17th Street, S. E., where they were seen by, and spoke

to, a Frankie Thompson. Appellant returned to the alley some time later, driving, or being driven in, a truck belonging to the District of Columbia government, and made inquiry of Frankie Thompson concerning the automobile.

Finally, the prosecution contended that Appellant returned to Mr. Spriggs' place of employment late in the afternoon, and told him to report that his automobile had been stolen. Mr. Spriggs did so. Under questioning by police officers, Mr. Spriggs admitted that he had lent his car to Appellant and that Appellant had told him to report that it had been stolen.

Defendant Robinson defended, primarily, on the ground of mistaken identity, and that he first met Appellant after both had been arrested for the robbery charged in the indictment.

Appellant did not take the witness stand in his own defense. However, the evidence introduced on his behalf showed that he had driven Mr. Spriggs' automobile on several occasions in March, 1968, as had various other persons. The evidence further tended to show that at the time Appellant was supposedly borrowing the automobile from Mr. Spriggs, he was actually going about his business in another part of the city.

After deliberations, the jury found Defendant Robinson not guilty on all four counts, and further found Appellant guilty on all four counts. On November 25, 1969, Appellant was sentenced to a maximum of five years imprisonment,

with recommendation for parole at any time within the five year period. This appeal followed.

Toward the end of Defendant Robinson's case, in open court, and before the jury, counsel for Defendant Robinson, having completed examination of one witness, stated: "I would like at this time to call Mr. Edward Hinton to the stand." (Tr. 1573). Appellant's trial counsel requested a bench conference at which time he objected to Appellant's having been called as a witness (Tr. 1574). Counsel for Defendant Robinson persisted in arguing that it was entirely proper for her to have called Appellant as a witness. In order to exercise his privilege against self-incrimination, she argued, he would be required to take the stand, be sworn, give his name, and refuse to answer questions (Tr. 1574).

Appellant's trial counsel argued that, as a defendant in the case, Appellant had a perfect right not to take the witness stand. In this contention, the prosecution agreed (Tr. 1576). The Court also agreed that, as a defendant, Appellant could refuse to leave his seat, and would not be required to take the witness stand in order to exercise his Fifth Amendment privilege (Tr. 1578).

The Court, at that point, stated:

> "That highlights the fact that Hinton was not becoming a witness. That, I think is error.
>
> "I think, for that reason, it was a mistake to call Mr. Hinton as you did to the witness stand in open court, that would prejudice Hinton." (Tr. 1578)

The Court then decided that no further mention of Appellant's

having been called, or his refusal, would be made (Tr. 1579).

At the end of the trial, while instructing the jury, the Court reminded the jury that counsel for Defendant Robinson had called Appellant as a witness, and that Appellant's counsel had objected. The jury was instructed "that every defendant in a criminal case has the absolute right not to testify. You must not draw any inference of guilt against the defendant because he did not testify." (Tr. 1863) Continuing, the Court said: "Mr. Robinson, on the other hand, took the stand in his own defense." (Tr. 1864).

Following the instructions, the jury retired to deliberate. As a result, Defendant Robinson was found not guilty, and Appellant was found guilty.

ARGUMENT

THAT APPELLANT'S BEING CALLED AS A WITNESS BY CO-DEFENDANT AND THE COURT'S INSTRUCTIONS TO THE JURY CONSTITUTED A DENIAL OF DUE PROCESS.

It is well-settled that the Fifth Amendment to our Constitution grants to each defendant in a criminal proceeding the absolute right not to be compelled to give testimony which will adversely affect his defense.[1/] Even beyond this, each defendant has the right to a trial at which his failure to testify is not made the subject of adverse comment.[2/] The question, then, is what constitutes an adverse comment on the subject of a defendant's refusal to testify, and at what point

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1/ McCarthy v. Arndstein, 266 US 34 (1924).

2/ Griffin v. California, 380 U.S. 609 (1965).

does it deny him due process of law.

There is no doubt that an explicit derogatory reference to a defendant's exercise of his Fifth Amendment privilege constitutes a denial of due process.[3] It surely makes no difference whether such comment is interposed by prosecutor, co-defendant or court.[4] It is the comment itself rather than its source which does the harm.[5]

Surely, however, not every implicit reference is such as to deny a defendant a fair trial. The mere fact that a jury observes the defendant's presence in the courtroom and notes that he had not taken the witness stand to deny his guilt and assert his innocence is a reminder during deliberations that the accused had nothing to offer. The rationale of the rule must be that this fact should not be exacerbated unnecessarily. A carefully worded instruction to the effect that our system of justice is such that an accused may stand mute without any inference of guilt, may ease the jury's realization that human nature does not suffer false accusations in silence.[6]

But at what point does the reference become prejudicial? The principle of the Fifth Amendment prevents the prosecution from calling a defendant as a witness. The same principle also prevents a co-defendant from calling him.[7]

3/ Griffin v. California, supra.
4/ Ibid.
5/ People v. Haldeen, 73 Cal. Rptr. 102 (Ct. App. 1968).
6/ Griffin v. California, supra (dissenting opinion).
7/ United States v. Wolfson, 289 F. Supp. 903 (S.D. N.Y. 1968).

This court has taken the position that a co-defendant cannot be permitted to call upon an accused to testify.[8] There the Court stated:

> "It was error to permit counsel for Roberts in the presence of the jury to call upon the co-defendants to testify, and he should not have been allowed to comment to the jury upon their failure to take the stand. Counsel's actions violated the rights of the defendants who did not testify...."

So serious was this that this Court felt compelled to warn, in a footnote, that counsel in cases in the District Court are on notice that similar conduct in the future could be grounds for disciplinary action.[9]

Despite the feeling of the Court that Coleman's rights had been violated, his conviction was not reversed. It was felt that the conduct did not contribute to his conviction in the light of the compelling evidence against him. Yet, it was made clear that in a closer case, reversal would be required.

It is respectfully submitted that the Court in Coleman did not go far enough. This Court would not permit a prosecutor to call a defendant as a witness, nor should it sanction this conduct. Regardless of the evidence against an accused, if his substantial rights are violated he should be entitled to a new trial. While the right to a fair trial does not mean a trial free from all error, it, at least, means that the defendant should be tried in such a manner that his

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8/ Coleman v. United States, D. C. No. 21,804, 420 F. 2d 616 (D. C. Cir. 1969).

9/ Id. at fn. 8.

substantial rights are not impaired.

No one can argue that rights granted under the Fifth Amendment are not substantial.

By the trial court's admission, calling Appellant to be a witness for his co-defendant was error, and was prejudicial. By the decision of this Court in Coleman it was error. It is respectfully submitted that wherever error is found, it should be expurged. There is no other method for defendants in criminal proceedings to obtain as fair and impartial a trial as our system of justice can devise.

Lest is be asserted that Coleman contained "more error" because of the comment on his failure to testify, it should be added that comment there was here also. While the trial court's instructions correctly stated the law, the unfortunate manner in which the instruction was given unnecessarily called to the attention of the jury Appellant's failure to take the stand when called and contained an adverse implication. The Supreme Court of Arizona has held that any direct or indirect statements amounting to an allusion that the defendant failed to testify may constitute reversible error. 10/ This Court can do no less.

Finally, it should be noted that, unlike Coleman, the evidence against Appellant was not so compelling that the error can truthfully be said to have had no effect whatever upon the outcome. Appellant's whereabouts in the late morning of March 21, 1968, were the subject of contradictory testimony.

10/ State v. Accosta, 416 P. 2d 560 (Ariz. 1966).

The courtroom identification of Appellant by Frankie Thompson was less than certain. The only other real evidence was fingerprint evidence found on the automobile. Testimony showed that Appellant drove this same automobile more than once in that general period of time. With this delicate balance of evidence, the error could well have made the difference between acquittal and conviction.

CONCLUSION

For these reasons, this Court is implored to root out the error which denies an accused of the most fair and impartial trial that our present system can devise, and to reverse the conviction in the lower Court.

Respectfully submitted,

EDWARD A. HINTON

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Thomas W. Fletcher

By: James A. Koerner
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His Attorneys, Appointed by this Court

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July 27, 1970

CERTIFICATE OF SERVICE

I, James A. Koerner, do hereby certify that I have delivered two copies of the foregoing Brief for Appellant this 27th day of July, 1970, to the following:

United States Attorney
United States Courthouse
Washington, D. C.

James A. Koerner
James A. Koerner

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UNITED STATES OF AMERICA,

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APPEAL FROM CONVICTION AND SENTENCE OF
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REPLY BRIEF FOR APPELLANT

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Appointed by this Court

November 9, 1970

ARGUMENT

The sole issue raised by this appeal is whether the improper action of Appellant's co-defendant at the trial, namely, calling in open court for Appellant to take the witness stand, so prejudiced the Appellant's case in the minds of the jury as to have a possible effect upon the jury's verdict. Appellant's argument is not that this action, though highly improper, was so outrageously and inherently prejudicial as to vitiate any trial under any circumstances whatever; rather Appellant believes that this fact is to be judged in the context of the particular circumstances of this case.

In its Brief, the government has adopted the incredible position that even though this action was "highly improper" and, indeed, was so characterized by the trial court, is no need for a reversal because of the overwhelming evidence of the Appellant's guilt. If we were to examine merely the quantity of the evidence, one could undoubtedly find it overwhelmingly in favor of the government, then our system of justice could consist only of a set of weights and a balance with no need of such trappings as judge and jury. But our system also looks to the quality of the evidence, for here the subjective determinations must be made. The record in this case is such that, in terms of quality, the evidence of Appellant's guilt is substantially less than overwhelming. In fact, the question of Appellant's guilt or innocence was so close that his co-defendant's calling him as a witness, thus compelling him to assert his privilege not to testify could easily have been the basis for the jury's decision.

The government's hasty and selective review of the evidence at the trial ignores those substantial portions of the trial which caused the jury to

deliberate long and hard before arriving at its verdict. While the government makes now, as it did at the trial, a great show about the evidence of Hinton's fingerprints and palm prints on and about Mr. Spriggs' automobile, it somehow fails to mention, even in passing, that the testimony clearly pointed out that Mr. Hinton had driven this car on several occasions during that period of time, as indeed had many others. The government neglects to assert that Mr. Spriggs was himself prohibited from driving during March, 1968, and was forced to rely on Mr. Hinton and others even to drive him to and from work in his own automobile. Undoubtedly the fingerprints of other of Mr. Spriggs' friends could also have been found in and about the vehicle.

Another important aspect of the government's case is the testimony of Frankie Thompson, who identified Hinton as the man driving the car into the alley and later returning to ask about it. The government merely states that he had ample opportunity to observe Appellant. Nowhere in its Brief does the government report that, by his own admission, Frankie Thompson was a dope addict at the time. During the period in question he had reached the point of several capsules a day. In fact, immediately following this incident Frankie Thompson volun tarily went to Lexington, Kentucky for "the cure". In stating that Thompson identified Appellant in court, the government failed also to state that when first asked, Thompson could not identify Hinton, but finally did so after much questioning, prodding and refreshing of recollection by the U.S. Attorney. Yet, Mr. Hinton was sitting right before his eyes at the counsel table.

While the government's Brief laboriously lists each of the several

items in the Spriggs car when it was returned to him by the FBI, it overlooked the undisputed testimony that this car was normally littered, and often carried around forgotten items of clothing and other clutter.

The above, and other qualifications, if not downright contradictions to the government's evidence, in addition to the defendant's own evidence, afford this Court some insight into the conflicting evidence which the jury had before it. It can thus be seen that the question of Hinton's guilt or innocence is less than completely obvious, as the Appellee's Brief would lead this Court to believe.

But whether or not Hinton is guilty as charged is not for this Court to decide. No issue is more clearly within the exclusive province of the jury. Even whether or not this Court believes the question of Hinton's guilt to be close is irrelevant. The initial determination for the Court is whether the jury so considered the issue to be close. Without direct testimony from the jurors themselves, of course, no definitive answer to this question can be given. However, a reasonable approximation of the jury's reaction can be ascertained from the external appearances of the jury. What actions of the jury display its feelings about this? Certainly one of the most obvious actions is the length of time the jury deliberated the case. Here, the Court gave its instructions to the jury in the late afternoon of March 24, 1969. The next morning the jury retired to deliberate on the verdict. The verdict against Hinton was finally reached late in the afternoon of March 26. In order to find Hinton guilty, the jury sat through almost two full days of deliberation. After delivering this verdict, the jury again retired to deliberate Robinson's case. Shortly thereafter, the jury returned with a verdict of not guilty as to Robinson.

The government's pr esent attempt to characterize this as an "open and shut" case is almost ludicrous in the light of these unusually lengthy deliberations. This Court is well-aware of the fact that it is a rare case indeed in which a jury must deliberate for two full days. It is respectfully suggested that the only possible reason for this is that the triers of fact, upon whom rested the duty of determining guilt or innocence, considered this to be an extremely close quest ion.

On balance, after extremely lengthy considerations, the jury decided upon a verdict of guilty as to Hinton. Who can say for certain what effect the highly improper procedure employed by counsel for Hinton's co-defendant had upon the jury? Appellant does not pretend to state categorically that without this error, a finding of not guilty would have been returned. Nor can the government say that it made no difference. What this Court must consider is the strong possibility that some adverse effect resulted.

The government has argued that any such adverse effect was taken care of by instructions. True, it is that careful instruction by the Court may lessen the harm, but they cannot erase it. The government would have had Appellant's trial counsel draft his own suggested instruction. This could have been done, but even that would not have eliminated the prejudice. The simple fact is that no charge to the jury, whether taken from a standard reference work or drafted by the most skilled legal craftsman could have expunged from the jury's mind its recollection of what occurred in the courtroom.

In Coleman v. United States, 137 U.S. App. D.C. 48, 420 F. 2d 616 (1969), this Court declined to reverse a conviction in a case which involved not only the calling of co-defendants but the compounded error of a later comment on

their failure to testify. As the government correctly noted the reason for this Court's action in that case was that the Court was "convinced beyond a reasonable doubt" that these errors did not contribute to the jury's convictions of the co-defendants. In other words, the jury would have reacted the same way had the errors not occurred. The question here is whether the jury in this case would have found the same way without the error. Appellant believes that, given the background, this Court cannot be similarly convinced beyond a reasonable doubt here.

If the Court has any doubts whatsoever of whether the error at trial may have influenced, even to the slightest degree, the verdict reached in this case, its duty is clear. The case must be returned for a new trial. In a case as close as this, nothing less will suffice.

WHEREFORE, it is prayed that this Court set aside the verdict of guilty, and remand this case to the trial court with instructions for a new trial.

Respectfully submitted,

EDWARD A. HINTON

By Thomas W. Fletcher /jrk.
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James A. Koerner
-James A. Koerner

Attorneys for Appellant
Appointed by this Court

November 9, 1970

CERTIFICATE OF SERVICE

I, James A. Koerner, do hereby certify that I have sent a copy of the foregoing "Reply Brief of Appellant", by United States mail, postage prepaid, this 9th day of November, 1970, to the following:

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Washington, D. C.

James A. Koerner

James A. Koerner